

TONY PUA KIAM WEE v. DATO' SRI MOHD NAJIB
TUN HJ ABDUL RAZAK

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
LAU BEE LAN JCA

[CIVIL APPEAL NO: W-02(IM)-1619-08-2018]
15 OCTOBER 2019

CIVIL PROCEDURE: *Action – Withdrawal of – Application to withdraw defamation suit whilst appeal process on interlocutory application pending in Federal Court – Whether withdrawal ought to have been allowed – Whether proceedings and prospective order should have been stayed pending outcome of appeal – Whether withdrawal of main suit would cause interlocutory applications to collapse – Whether application for withdrawal should be dismissed*

The appellant's appeal was against the decision of the High Court allowing the respondent's application to withdraw his defamation suit notwithstanding that (i) the High Court had granted an interlocutory injunction to restrain the appellant from streaming a Facebook clip of his speech which the respondent claimed was defamatory; (ii) the Court of Appeal affirmed the interlocutory injunction; and (iii) the appellant was awaiting an appeal process in the Federal Court on the issue of the interlocutory injunction ('injunction appeal'). The central contention of the appellant was that the respondent ought not to have been allowed to withdraw the suit without the Federal Court deciding on the appellant's appeal and, at most, the High Court should have only stayed the proceedings and the prospective orders pending the outcome of the Federal Court's decision.

Held (allowing appeal with costs)

Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

- (1) The right to withdraw the action rests with the respondent with a small window for the court to direct the matter to proceed and also hear the appellant's evidence. The issue, at the end of the day, would only relate to costs and issues of damages related to unlawfully securing interlocutory orders. In the event the appellant, by the conduct of the respondent's action, had suffered loss and damages, other forms of action could be mounted for abuse of process of the court, including action for malicious prosecution, the success of which depends on the facts of each case and gravity of the abuse. Once the main suit was withdrawn, all other applications and interlocutory orders made by the respondent or appellant would also collapse. Stay of proceedings might not be an appropriate relief purely on the ground that there was an

- A appeal pending in the Federal Court. Further, once the main suit was withdrawn, the interim order would be vacated. Hence, this was a fit and proper case to allow the appeal. The orders that ought to have been made by the High Court were: (i) dismissing the plaintiff's/respondent's action with costs; and (ii) setting aside the interlocutory injunction with an order for assessment of damages. (paras 13 & 15)
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Case(s) referred to:

Castanho v. Brown & Root (UK) Ltd and Another [1981] 1 All ER 143 (*refd*)

Christie v. Christie [1873] Ch App 499 (*refd*)

Covell Matthews & Partners v. French Wools Ltd [1977] 1 WLR 876 (*refd*)

- C *Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal* [2017] 1 LNS 2086 CA (*refd*)

Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan [2002] 3 CLJ 370 CA (*refd*)

Pegawai Pengurus Pilihanraya Dewan v. Streram Sinnasamy & Ors [2019] 1 LNS 589 CA (*refd*)

- D **Legislation referred to:**

Courts of Judicature Act 1964, s. 69

Federal Constitution, art. 10

Other source(s) referred to:

CM Row's *Law of Injunctions*, 9th edn 2013, p 59

- E *For the appellant - Surendra Ananth & Tan Ch'eng Leong; M/s KP Lu & Tan*
For the respondent - Mohd Hafarizam Harun & Norhazira Abu Haiyan; M/s Hafarizam Wan & Aisha Mubarak

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-23CY-17-04-2017 (overruled).]

- F *Reported by S Barathi*

JUDGMENT

Hamid Sultan Abu Backer JCA:

- G [1] The appellant appeals against the decision of the learned High Court Judge who allowed the respondent's application to withdraw his defamation suit notwithstanding:
- H (a) The High Court had granted an interlocutory injunction to restrain the appellant from streaming Facebook clip of his speech which the respondent claimed was defamatory;
- (b) On appeal to the Court of Appeal, the Court of Appeal affirmed the interlocutory injunction; and
- I (c) The appellant is awaiting an appeal process in the Federal Court on the issue of the interlocutory injunction.

[2] The central contention of the appellant before us was that the respondent ought not to have been allowed to withdraw the suit without the Federal Court deciding on the appellant's appeal and at the most the High Court should have only stayed the proceedings and the prospective orders pending the outcome of the Federal Court's decision. The learned counsel for the appellant's submission on these points *inter alia*, in *verbatim* read as follows:

1.1. At the time the Statement of Claim was filed, the Respondent was the Prime Minister of Malaysia.

1.2. The Appellant was the Member of Parliament for Petaling Jaya Utara and had been a member of the Public Accounts Committee, a standing committee of the Dewan Rakyat. He was also a member of the Central Executive Committee of the Democratic Action Party.

1.3. The Respondent sued the Appellant for defamation in relation to certain statements made by the Appellant in the Parliament building which concerns the interest of the public. The Respondent obtained an injunction in the High Court to restrain the Appellant from uttering or publishing such statements or similar statements. The Court of Appeal upheld the said injunction. The Federal Court granted leave to the Appellant to appeal against the Court of Appeal decision. This will be explained below.

1.4. It was only after the Appellant had obtained leave from the Federal Court that the Respondent had applied to discontinue his claim.

2. In essence, it is the Appellant's position that discontinuing the proceedings at this stage would be greatly prejudicial to the Appellant as the Respondent had secured a benefit by obtaining the injunction against the Appellant. For clarity, it is not the Appellant's position that the Respondent should be compelled to prosecute his claim. The Appellant's position is that the proceedings should only be discontinued upon the disposal of the Appellant's appeal against the injunction in the Federal Court.

[3] The learned counsel for the respondent had specifically set out the incriminating facts and circumstances which led to the interlocutory injunction. That part of the submission read as follows:

7. The Appellant is a member and the National Publicity Secretary of the Democratic Action Party ("DAP") and the Member of Parliament for the Constituency of Petaling Jaya Utara.

8. On 06.04.2016, the Appellant had made a statement at the foyer of the Parliament Building whereby this fact has been admitted by the Respondent.

A 9. On 06.04.2017, the Appellant had caused to be published through the
Appellant's Facebook page at [https://www.facebook.com/MPTonyPua?](https://www.facebook.com/MPTonyPua?fref=ts)
fref=ts a live video under the caption "After debating a new Tourism tax
B bill which was passed by the BN MPs at 5am this morning, the Govt
abandoned 5 other key bills which were tabled for debate. This is purely
to allow for PAS President Dato' Seri Hadi Awang to table his private
member's bill to amend RUU355 Syariah Courts (Criminal Jurisdiction)
C Act. Opposition motions and bills have never made it to the House Floor
for debate in the history of Malaysian Parliament, because BN controls
what gets tabled, in collusion with the House Speaker. The question then
must be asked, why did BN - that's UMNO, MCA, MIC, Gerakan and
the Sabah-Sarawak parties - bend over backwards to give precedence to
D the PAS private member's bill? What more, PAS only has 14 MPs in the
House, out of 222 in total - compared to Pakatan Harapan with more than
70 MPs - why is BN making PAS so "powerful"? It is clear that UMNO
is allowing the PAS motion for political reasons to divide the opposition
support, while MCA, Gerakan, MIC and other BN component parties are
mere self-serving eunuchs in BN's decision-making process." ("the said
Live Video").

10. The said Live Video was published by the Appellant contained,
inter alia, the following words which the Respondent claimed to be false
and/or malicious and defamatory of Respondent:

E ... there will be no more debates on any other laws on Parliament
until August this year. So for the next five months, there will be
no new bills passed, and all these five important bills, Government
Bills, are actually postponed, just for what? Just to allow Marang
F to table the Private Members Bill. So this question must be
answered by the Prime Minister, must be answered by the
component parties of Barisan Nasional. There is no point saying
that the Government is not tabling the Bill, when they actually
grant precedence under the instructions of the Cabinet to allow for
PAS with only 14 MPs in the Parliament. 14 out of 222 given the
G right to table this Bill. Even DAP has more MPs, we have 38 MPs
... 26 today, then ... aaa ... PKR has 30 ... 28 MPs. All of us have
more MPs in the House, we are not allowed to table our Private
Member's Bill or Motions, but PAS with only 14 MPs, is allowed
H to table their Bills. *So there is a clear cut collusion between
Dato' Sri Najib Razak, between BN and PAS, with the political intent of
splitting the Malay to vote among the opposition and with the political intent
to keep hanging onto power despite the fact that he is the most unpopular
Prime Minister in the history of Malaysia.* And we can see that the
entire hoo-haa ... brouhaha ... was actually designed as a political
I scheme to distract Malaysians from the crimes that the Prime Minister has
committed mainly the fact that the Prime Minister has stolen billions of
Ringgit from IMDB, a wholly own subsidiary of the Government of
Malaysia. So we must not fall into the trap put forward by the

Prime Minister in collusion with PAS. Malaysia must hold firmly strong. We will, on the part of DAP, reject the Private Member's Bill brought forward (*sic*) by Marang, but the bigger agenda, the woods that *we should not lose sight of is to bring down a kleptocratic administration led by the biggest thief of all in the country, Dato' Sri Najib Razak.*" ("the said impugned words")

11. The said impugned words were published *via* a Facebook site which is accessible to everyone who opened the site as admitted by the Appellant. The extent of circulation *via* the internet is enormous. As of 10.4.2017, (date before the serving of the Letter of Demand by the Respondent), the said recording has been viewed 82,434 times on the Appellant's Facebook page while there are 310,256 Facebook users following the Appellant's Facebook page.

12. The effect in publication *via* the internet has a tremendous multiplying effect. There is no knowing the fact that it was downloaded and circulated to others. The circulation is not only confined to within the country but also to the worlds (*sic*) outside.

[4] It is important to note that an interlocutory injunction to restrain the circulation or publication of purported defamatory material which has direct nexus to the public and freedom of speech under art. 10 of the Federal Constitution is rarely given unless the language used is grossly scandalous and not related to the truth or falsity of the statement. What is considered to be grossly scandalous statements was explained in an unanimous decision of the Court of Appeal in the case of *Pegawai Pengurus Pilihanraya Dewan v. Streram Sinnasamy & Ors* [2019] 1 LNS 589. That case makes reference to the UK Law Commission Report 2012 where a passage by Dr Venkat Iyer was cited for the proposition which we produced below:

- (1) In *Wong Yeung Ng v. Secretary of Justice* a newspaper was held guilty of contempt for describing some judges as "dogs and bitches", "scumbags", "public enemy of freedom of the press and a public calamity to the six million citizens of Hong Kong", "British white ghosts" and "pigs", and threatening to "wipe [them] all out".
- (2) In a then unreported case in South Australia, a radio presenter discussing a story about a magistrate invited his listeners to "smash the judge's face in".

[See 'The Media and Scandalising: Time for a Fresh Look' (2009) 60 Northern Ireland Legal Quarterly 245].

[5] "Scandalous" generally refers to matters which improperly causes a derogatory light on someone, usually a party to the action, with respect to moral character or uses repulsive language. In *Christie v. Christie* [1873] Ch App 499, Lord Selborne made the following observations:

- A The sole question is whether the matter alleged to be scandalous [w]ould be admissible in evidence to show the truth of any allegation in the [p]leading which is material with reference to the relief prayed.
- B [6] Thus, the threshold of scandalous statement is extremely high in contrast to that of defamation. In defamation, the version of the defendant may be true or untrue. However, when the allegation is said to be scandalous, it must be of severe nature *inter alia* as stated in the two examples cited by Dr Venkat Iyer to meet the threshold for injunction under the jurisprudence related to defamation read with art. 10 of the Federal Constitution. It must be emphasised here that when the jurisprudence of defamation was developed in England, similar jurisprudence related to art. 10 of the Federal Constitution was not in vogue in England.
- C [7] Thus, the threshold to seek an injunction for defamation when art. 10 of the Federal Constitution is involved with regard to any statement intended in matters related to public interest is extremely high. Words such as criminal, thief, kleptocrat, political rowdy, etc against politicians or person holding public office in many places in the Commonwealth countries where corruption index is high will not meet with the threshold to obtain an interlocutory injunction when a cause of action is mounted on defamation. However, if such words are used against private person where the public interest is not involved, the court may grant an injunction but usually it will be slow in granting an injunction as defamation suit is related to compensation for damage to reputation and truth is a complete defence. The court needs to weigh the affidavit evidence as the justice of the case may demand.
- D [8] In addition, when an interlocutory injunction is granted, it will be done so with an undertaking as to damages. When a plaintiff withdraws a suit after having obtained an interlocutory injunction, it cannot be on the basis of costs alone but there must also be an order to set aside the interlocutory orders as well as an order for assessment of damages. Further, a case withdrawn after some judicial orders have been made will warrant the matter to be dismissed as opposed to be struck out unless the action becomes academic.
- E [9] In the instant case, we note that the learned High Court Judge had only allowed the withdrawal with costs and without setting aside the interlocutory injunction.
- F [10] In consequence, we invited parties to submit on these issues and also on the hearing of the appeal on 4 April 2019, we directed parties to submit on two issues:
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- H
- I

3.1. Whether the High Court should have stayed the underlying proceedings, including the Respondent's application to discontinue his claim, pending the disposal of the Injunction Appeal?

A

3.2. If so, can the said order be made by the Court of Appeal at this juncture?

Brief Facts And Grounds

B

[11] The brief facts and grounds of the case placed in a rudimentary manner before us is repeated to save court's time and it reads as follows:

Brief facts:

1. The plaintiff/respondent/P1 filed this suit claiming for defamation uttered to him by the defendant/appellant/D1. When the case was fixed for trial, P1 made an oral application to withdraw the suit and the notice of withdrawal (*sic*) was already made known during the case management stage.

C

2. Previously, the High Court allowed P1's application for injunction against D1 from allowing the streaming of the relevant video pending the disposal of this suit. The decision was affirmed by the Court of Appeal and was (*sic*) pending appeal before the Federal Court (Injunction Appeal).

D

3. D1 objected on the withdrawal because the case is on advance stage and had fulfilled the *dominus litis*. P1 should not be allowed to change his course of this case since P1 already opted to continue with the injunction appeal. P1 had benefited from the injunction order.

E

4. High Court; P1's oral application to withdraw the suit was allowed with no liberty to file afresh. The suit was struck out with costs of RM30,000 to be paid to D1 within 2 weeks.

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5. There are 2 Grounds of Judgment provided by the High Court for this matter. The 2nd Grounds of Judgment was the updated version of the 1st Grounds of Judgment.

Grounds Of Decision Of High Court (Original)

Whether P1's Application Should Be Allowed

G

[6] The court has unfettered discretion to allow withdrawal of suit. D1 is not grievously prejudiced by this application. The suit has not reached *dominus litis* stage for P1 to be forced to continue with the suit. P1 did not get clear benefit by the injunction order. Previously (*sic*), the court only grant interim injunction in favour of P1 but only to stop the streaming of the video. The withdrawal will be the end of the suit with no liberty to file afresh.

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I

A Grounds Of Decision Of High Court (Updated)

Whether P1's Application Should Be Allowed

[7] The main suit is for defamation of the word uttered by D1 outside the parliament against P1 on 6 April 2017. The statement then was uploaded on D1's facebook. In defence, D1 claimed that it was a justification, fair comment and a qualified privilege. After the election result, P1 wished to withdraw the suit. D1 argued that there was (*sic*) some documents that was classified as confidential being re-opened after the election result and D1 would lose his benefit of the situation. D1 also argued that P1 should be estopped since P1 had opted to proceed with the injunction appeal to the Federal Court. D1 further argued that P1 would get the benefit by restricting D1's freedom of speech. (Some cases were added in this grounds of judgment). P1 is the one who had high interest in this suit. D1 would not be affected by the withdrawal of this suit. P1 should not be forced to continue with this suit. (The rest are the same with the original version).

D [12] The memorandum of appeal reads as follows:

1. Yang Arif Hakim Mahkamah Tinggi dalam melaksanakan budibicara ('discretion') beliau telah gagal untuk mengambil kira dan/atau gagal untuk mengguna pakai dengan wajarnya prinsip-prinsip undang-undang yang terpakai berkenaan dengan satu permohonan bagi kebenaran untuk pemberhentian ('discontinuance') atau penarikbalikan ('withdrawal') di bawah Aturan 21 Kaedah 3 Kaedah-Kaedah Mahkamah 2012.

2. Khususnya, Yang Arif Hakim Mahkamah Tinggi telah gagal untuk mengambil kira dan/atau mempertimbangkan secara wajarnya faktor-faktor berikut:

- F (i) Prosiding-prosiding di Mahkamah Tinggi telahpun mencapai satu tahap yang matang (advanced stage) dan Perayu/Defendan adalah *dominus litis*;
- (ii) Perayu/Defendan telahpun mendapat kebenaran untuk merayu kepada Mahkamah Persekutuan ("Kebenaran untuk Merayu") ("Rayuan tersebut") terhadap perintah Mahkamah Tinggi bertarikh 4.8.2017 yang telah membenarkan permohonan Responden/Plaintif untuk satu injunksi interim ("Perintah Injunksi");
- G (iii) Dalam Rayuan tersebut, terdapatnya persoalan-persoalan undang-undang yang telahpun dikenalpasti sebagai penting dan wajar dijawab oleh Mahkamah Persekutuan;
- H (iv) Pada masa yang matan, Responden/Plaintif telahpun memilih untuk meneruskan dengan pendengaran permohonan Perayu/Defendan bagi kebenaran untuk merayu kepada Mahkamah Persekutuan dan apa-apa rayuan yang timbul sebagai akibatnya, dan bukannya untuk menghentikan atau menarikbalik tindakan beliau;
- I

- (v) Pemberhentian atau penarikan balik tindakan tersebut akan memprejudiskan atau menafikan kelebihan (advantage) yang telah dicapai oleh Perayu/Defendan dalam mendapat Kebenaran untuk Merayu tersebut; A
 - (vi) Sebaliknya, Responden/Plaintif telahpun menikmati kelebihan dan manfaat Perintah Injunksi tersebut sejak 21.4.2017 tanpa perbicaraan penuh, yang mana Perayu/Defendan menegaskan adalah satu halangan yang tidak wajar atas hak perlembagaan beliau kepada kebebasan untuk bersuara; B
 - (vii) Permohonan yang hanya dibuat begitu lewat oleh Responden/Plaintif untuk menghentikan atau menarik balik tindakan beliau di sini, adalah satu pergerakan taktikal (tactical manouvre) (*sic*); C
 - (viii) Oleh demikian, Responden/Plaintif sepatutnya diestop atau dihalang daripada menghentikan atau menarik balik tindakan di sini. D
3. Dalam segala keadaan kes ini, Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dalam membenarkan permohonan Responden/Plaintif dan membenarkan pemberhentian atau penarikan balik tindakan di sini.

[13] We have read the appeal records and the able submissions of the parties. After much consideration to the submissions of the parties, we take the view that the appeal has merit. Our reasons *inter alia* are as follows:

- (i) It is trite the right to withdraw the action rests with the plaintiff with a small window for the court to direct the matter to proceed and also hear the defendant's evidence. (See *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* [2002] 3 CLJ 370; [2002] 3 MLJ 155; *Covell Matthews & Partners v. French Wools Ltd* [1977] 1 WLR 876; *Castanho v. Brown & Root (UK) Ltd and Another* [1981] 1 All ER 143). The issue, at the end of the day, will only relate to costs and also issues of damages related to unlawfully securing interlocutory orders. In addition, we must say that in the event the defendant by the conduct of the plaintiff's action has suffered loss and damages, etc; other form of action can be mounted for abuse of process of the court inclusive of action for malicious prosecution. Whether such action will succeed or not will depend on the facts of each case and the gravity of the abuse. E
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- (ii) As far as this action is concerned, once the main suit is withdrawn, all other applications and interlocutory orders made by the plaintiff or defendant will also collapse. In our view, it is one of common sense related to the rule of law as well as procedure. Stay of proceedings on the facts may not be an appropriate relief purely on the ground that there is an appeal pending in the Federal Court. H

I

- A (iii) On the issue of whether interim order will be dissolved if the main suit is withdrawn, we are of the view, it is deemed to be vacated save that it should be through the order of court and where relevant, the court must order inquiry as to damages when there is a specific undertaking as to damages. Support for the proposition is found in a number of cases cited by the parties herein. It is sufficient for us to quote from *CM Row's Law of Injunctions* (9th edn 2013) at p. 59, where the learned author observed:
- B

C When a party obtains an interim order and he does not choose a final adjudication and voluntarily withdraws his cause and the final proceedings is dismissed as withdrawn, the interim order automatically stands vacated ... [See *V Ramakrishna v. N Sarojini* AIR 1993 AP 147].

- D [14] We are mindful of the submission of the appellant on the nature of the order they were seeking if this appeal were to be allowed. We must say that a judge does not sit like an arbitrator who receives remuneration from parties to answer all questions raised and give reasons for not doing so. An arbitrator is vested with powers as agreed by the parties and he is not bound by rules of procedure of courts and/or the Evidence Act. The only guideline is, he must not breach rules of natural justice, rules of procedure parties have agreed to and must act in good faith. The jurisprudence related to arbitration is not courts' model, though some judgments appear to have endorsed it. Our powers in respect of appeal is anchored in s. 69 of the Courts of Judicature Act 1964. We have wide discretion to make any form of just orders which ought to have been made whether or not there was submission from parties or there was a particular appeal or cross-appeal, etc. The powers of court and its jurisdiction was explained by the Court of Appeal in *Kenanga* case [*Kenanga Investment Bank Berhad v. Swee Joo Berhad & Ors And Another Appeal* [2017] 1 LNS 2086], in great detail under the caption of 'micro' and 'macro' jurisprudence. We do not think it is necessary to repeat the same.
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- G [15] After having considered the relevant authorities, we take the view that this is a fit and proper case for the appeal to be allowed and the orders ought to have been made by the High Court are as follows:

- (i) Plaintiff's action is dismissed with costs;
- H (ii) Interlocutory injunction is set aside with an order for assessment of damages.

[See s. 69 of CJA 1964].

- I [16] For reasons stated above, we allow the appeal with costs. The High Court's order is substituted with the orders stated in para. [15] above.

We hereby order so.
